No. 18-489

# In The
# Supreme Court of the United States

BRADLEY WESTON TAGGART,

*Petitioner,*

v.

SHELLEY A. LORENZEN, ET AL.,

*Respondents.*

**On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit**

## BRIEF OF *AMICI CURIAE* THE HONORABLE EUGENE WEDOFF (RET.), THE HONORABLE LEIF CLARK (RET.), AND A GROUP OF LAW PROFESSORS IN SUPPORT OF PETITIONER

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## INTEREST OF THE AMICI CURIAE[1]

The amici curiae, whose names are set forth below, include two retired United States bankruptcy judges and a group of law professors. Your amici teach courses on bankruptcy law, conduct research, and are frequent speakers and lecturers at seminars and conferences on bankruptcy law. Our interest in submitting this brief is to assist the Court by identifying the relevant statutory history leading to the enactment of §§ 524(a)(1) and (a)(2) of the U.S. Bankruptcy Code,[2] as well as legal scholarship and empirical studies demonstrating the effectiveness of the discharge provisions in achieving the Congressional goals, both for individual debtors and the larger economy. This statutory history provides critical guidance in framing the appropriate legal standard for violations of the discharge injunction under § 524(a)(2). The Ninth Circuit's decision will significantly weaken the protection of the Code's discharge provisions and will thereby cause unwarranted financial injury both to individual debtors and to the larger economy.

The Honorable Eugene Wedoff (ret.) served as a United States Bankruptcy Judge in the Northern District of Illinois in Chicago from 1987 to 2015 and as Chief Judge from 2002 to 2007. Judge Wedoff was

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[1] Pursuant to Supreme Court Rule 37, counsel of record for petitioner and respondents have consented to its filing. No counsel for a party authored this brief in whole or in part, and no person other than amici or their counsel contributed any money to fund its preparation or submission.

[2] 11 U.S.C. §§ 101 *et seq.* (the "Code").

formerly a partner at Jenner & Block. He served as chair of the Advisory Committee on Bankruptcy Rules from 2004 to 2014 and as a governor, secretary, and president of the National Conference of Bankruptcy Judges through 2015. He is the immediate past president of the American Bankruptcy Institute.[3] He is a Fellow of the American College of Bankruptcy and a conferee of the National Bankruptcy Conference.

The Honorable Leif M. Clark (ret.) served as a United States Bankruptcy Judge for the Western District of Texas from 1987 to 2012. Prior to that, he was a partner with Cox & Smith (now Dykema Cox Smith). He served on the endowment boards for both the American Bankruptcy Institute and the National Conference of Bankruptcy Judges, evaluating grant requests for empirical work in bankruptcy. He assisted in developing and administering judicial training programs for judges in Central and Eastern Europe. He is a member of the American College of Bankruptcy and a conferee of the National Bankruptcy Conference, and continues to speak on bankruptcy topics nationwide.

Professor Margaret Howard is the Law Alumni Association Professor of Law, Emerita, at Washington and Lee University School of Law, Lexington, Virginia. She holds a B.A. from Duke University, a J.D. and M.S.W. from Washington University in St. Louis, and an LL.M. from Yale University. She has served as the

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[3] The views set forth herein are the personal views of Judge Wedoff and the named amici and may not reflect any position of the American Bankruptcy Institute, which has not participated in this appeal.

Scholar in Residence at the American Bankruptcy Institute, and as the American Bankruptcy Institute's Vice President in charge of the Research Grants Committee. She is a fellow of the American College of Bankruptcy and the American Law Institute. Her publications include *A Theory of Discharge in Consumer Bankruptcy,* 48 Ohio St. L.J. 1047 (1987), and *Stripping Down Liens: Section 506(d) and the Theory of Bankruptcy*, 65 Am. Bankr. L.J. 373 (1991).

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Professor Bruce A. Markell is the Professor of Bankruptcy Law and Practice at Northwestern Pritzker School of Law, part of Northwestern University. He is a former bankruptcy judge and a former member of the Ninth Circuit's Bankruptcy Appellate Panel. He is a co-author of four casebooks in bankruptcy, contracts, secured transactions, and securitization. He is a founding member of the International Insolvency Institute, a member of the Board of Editors of *Collier on Bankruptcy*, an elected member of the American Law Institute, a conferee of the National Bankruptcy Conference, and a fellow of the American College of

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Professor Michael D. Sousa is an Associate Professor of Law at the University of Denver Sturm College of law. He received his J.D. from Rutgers University School of Law, his LL.M. in bankruptcy from St. John's University School of Law, his Master's of Arts degree in anthropology from the University of Denver, and is currently pursuing a Ph.D. in sociology from the University of Colorado–Boulder. He is a member of the Advisory Board for the LL.M. in Bankruptcy Program at St. John's University School of Law and sits on the Editorial Boards for both the American Bankruptcy Institute Law Review and the American Bankruptcy Law Journal.

Professor Jack F. Williams is a Professor of Law at Georgia State University and the Center for Middle East Studies, where he teaches and/or conducts research on bankruptcy and business organizations; mergers and acquisitions; and taxation and statistics. He is the Scholar in Residence of the Association of Insolvency and Restructuring and a fellow in the American College of Bankruptcy. He holds a B.A. in economics from the University of Oklahoma, a J.D. with High Honors from George Washington University National Law Center, and a Ph.D. in archaeology from the University of Leicester in Leicester, United Kingdom.

## SUMMARY OF THE ARGUMENT

The bankruptcy discharge is one of the foundational aspects of bankruptcy law. Commentators have observed that the bankruptcy discharge "ranks ahead in importance of all other [provisions] in Anglo-American bankruptcy history. . . ." John C. McCoid, II, *Discharge: The Most Important Development in Bankruptcy History*, 70 Am. Bankr. L.J. 163, 164 (1996). The discharge is the "crown jewel of [bankruptcy] legislation." F. Regis Noel, *A History of the Bankruptcy Law* 200 (1919).

In order to ensure that the discharge is effective, Congress provided that the discharge gives rise to a statutory injunction and voids any judgment or action taken in derogation of the discharge. 11 U.S.C. §§ 524(a)(1) and (a)(2). Section 105 of the Code authorizes a bankruptcy court to enforce the injunction through a contempt sanction. Indeed, contempt may be the sole remedy for a violation of the discharge injunction.[4]

Despite this, the Ninth Circuit held that a creditor's knowing violation of the discharge injunction could not be remedied by a contempt sanction if the creditor had a good faith, subjective belief that the discharge did not pertain to *its claim*. *Lorenzen v. Taggart*

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[4] Various courts have held that the exclusive remedy for violation of the discharge injunction is a contempt proceeding. *Walls v. Wells Fargo Bank, N.A.*, 276 F.3d 502, 508 (9th Cir. 2002). *See also Cave v. Valley Collection Services, LLC*, No. cv-15-00390, 2015 WL 12938941 (D. Ariz. June 18, 2015).

(*In re Taggart*), 888 F.3d 438 (9th Cir. 2018). The court held that even an "unreasonable belief" can satisfy the good faith standard. *Id.* at 444 (a "good faith belief, even if unreasonable" insulates creditors from a contempt finding). In effect, the court's ruling makes ignorance of the law a complete defense to a knowing violation of the discharge injunction, even if the creditor's ignorance of the law is based on unreasonable assumptions or conduct (for example, a failure to investigate the discharge's scope).[5]

This Court has long held that civil contempt does not countenance a good faith belief defense. *McComb v. Jacksonville Paper Co.*, 336 U.S. 187, 191 (1949).[6] The same rule has been applied in the bankruptcy context by the other circuits which do not permit a subjective "good faith" test to be a valid defense for disregarding the discharge injunction, and certainly none permit an unreasonable belief to be a defense. For example, the Eleventh Circuit held that "the focus of the court's inquiry in civil contempt proceedings is not on the subjective beliefs or intent of the alleged contemnor in complying with the order, but whether in fact their conduct complied with the order at issue." *In re Hardy*, 97 F.3d 1384, 1390 (1996) (citation omitted).

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[5] This Court recently rejected a similar defense of "ignorance of the law" in another consumer protection context. *Jerman v. Carlisle, McNellie, Rini, Kramer & Urlich, LPA*, 130 S.Ct. 1605, 1607 (2010) (discussed below).

[6] "Since the purpose [of civil contempt] is remedial, it matters not with what intent the defendant did the prohibited act." *Id.* at 191.

Your amici urge this Court to reject the subjective standard of "unreasonable" good faith in *Taggart*, and thus reverse the Ninth Circuit on the following grounds, in addition to those asserted by the petitioner.

First, while the Code contains no express statement on the legal standard for a contempt sanction, the history and structure of the discharge provisions do provide the basis for the correct legal standard. Congress intended for the discharge to provide a "fresh start," and since passage of the 1898 Bankruptcy Act has increasingly provided for protection of that fresh start, culminating in the statutory injunction of § 524(a)(2) in the current Bankruptcy Code. The principal purpose of § 524(a)(2) is to prohibit the kind of conduct that occurred here—seeking payment of claims that have been discharged. The history and structure demonstrate that Congress did not intend to permit creditors to disregard the discharge based on an assertion of a subjective, good faith belief that their conduct somehow fell outside the scope of the discharge.

Second, the Ninth Circuit's decision will permit abusive creditor conduct. Congress has noted that institutional creditors often seek to intimidate debtors into surrendering their valid discharge rights. *See* S. Rep. No. 1688 at 2-3 (1960) (Comm. Rep.); *see also Midland Funding, LLC v. Johnson*, 137 S.Ct. 1407, 1416-18 (2017) (Sotomayor, J., dissenting) (noting practice of institutional debt collectors to sue on time barred claims in the hope that consumers will not respond to the lawsuit). The Ninth Circuit's decision will

encourage the filing of claims on discharged debt by aggressive creditors who will be able to argue that despite their *actual* knowledge of the discharge order, they were unaware that it applied to *their* claims and so cannot be found in contempt. The decision removes much of the risk in a creditor's seeking to collect upon a discharged claim.

Third, a large body of empirical data and peer-reviewed scholarship demonstrate that the discharge has been effective in achieving the Congressional goals and purposes. Nearly one million individuals seek bankruptcy relief each year.[7] Reversal of the Ninth Circuit's decision is imperative in order to prevent harm to significant numbers of bankruptcy debtors. It is the bankruptcy discharge that alters the often-grim reality facing many bankruptcy debtors and restores them to being productive members of the economy. The "failure to achieve discharge can amount to a financial death sentence." *In re Hyman*, 502 F.3d 61, 66 (2d Cir. 2007).

For over 100 years, this Court has acknowledged that the discharge provisions carefully balance the needs of the debtor and the larger economy. *Local Loan Co. v. Hunt*, 292 U.S. 234, 245 (1934) holding that the discharge is *both* a "fundamental private necessity" and a matter of "great public concern." The

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[7] The number of non-business bankruptcy filings in 2017, 2016, and 2015 was as follows: 770,901, 808,781, and 911,086, respectively. *March 2017 Bankruptcy Filings Down 4.7 Percent*, United States Courts (Apr. 19, 2017), http://www.uscourts.gov/news/2017/04/19/march-2017-bankruptcy-filings-down-47-percent.

Congressional intent to ensure a meaningful and effective discharge for bankruptcy debtors, as well as the implementation of this Court's recognition of these goals, mandates reversal of the Ninth Circuit's decision.

## ARGUMENT

### I. The text, structure and history of the U.S. bankruptcy laws demonstrate that Congress intended to provide a vigorous contempt sanction for violation of the discharge injunction of § 524(a)(2).

#### A. The Bankruptcy Act of 1898 reflects Congress' goal of providing ample protection against creditors seeking to disregard the bankruptcy discharge.

The discharge provisions are the heart and soul of bankruptcy for individual debtors. Over 200 years ago Sir William Blackstone wrote that through the discharge "the bankrupt becomes a clear man again; and, by the assistance of his allowance and his own industry, may become a useful member of the commonwealth." 2 *William Blackstone, Commentaries**484. More recently, Professor Charles Tabb writes, "[T]he introduction of the discharge [into modern bankruptcy law] could well be considered the single most important event in bankruptcy history." Charles J. Tabb, *Bankruptcy Anthology* 524 (2002).

Despite the central importance of the bankruptcy discharge, the Ninth Circuit held that a creditor can

avoid remedial sanctions for violating the discharge injunction of § 524(a)(2) based merely on the creditor's good faith belief that the discharge injunction does not apply to *its* claim, even if such belief is unreasonable. The Ninth Circuit held that respondents' faulty understanding of the effect of the discharge is a complete defense to the imposition of sanctions for their violation of the injunction. In short, the ruling by the Ninth Circuit makes ignorance of the law a defense to violating the discharge injunction, even if that ignorance is the result of unreasonable conduct or a failure to make due inquiry.

Congress did not intend for creditors to be able to disregard the discharge injunction based upon such a subjective showing of good faith. While the Code does not contain an express sanction for violation of the discharge injunction, the structure and history of the discharge provisions culminating in the enactment of § 524(a)(2) *do* provide ample guidance for the correct outcome in this case. In framing the appropriate legal standard to govern the imposition of contempt for violation it is critical to "look to the provisions of the whole law, and to its object and policy." *Kelly v. Robinson*, 479 U.S. 36, 43 (1986). *See also Jerman v. Carlisle, McNellie, Rini, Kramer & Urlich*, 130 S.Ct. 1605, 1607 (2010) (holding that in determining whether mistake of law is a defense the Court should look to the "statute's context and history"). The same applies here.[8]

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[8] Further, bankruptcy law "must be liberally construed to give the debtor the full measure of the relief afforded by Congress,

Beginning in at least 1898, and continuing to the 1978 Code, Congress has enacted statutory protections that increasingly sought to prohibit creditor conduct that ignores the discharge, including suing debtors on discharged claims and to limit the need for judicial involvement in the discharge process. The Ninth Circuit's decision runs directly counter to the statutory history, weakens the discharge injunction, and encourages precisely the kind of creditor abuse that Congress has sought to eliminate.

The modern notion of the bankruptcy discharge came into being when Congress enacted the Bankruptcy Act of 1898.[9] This was the fourth federal bankruptcy law, and it demonstrated a decidedly "pro-debtor discharge policy."[10] Until then, American bankruptcy law had essentially looked to English bankruptcy law, which had first introduced the notion of a discharge in the Statute of Anne in 1705.[11]

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lest its benefits be frittered away by narrow formalistic interpretations." *Wright v. Union Cent. Life Ins. Co.*, 311 U.S. 273, 279 (1940) (citation omitted).

[9] Bankruptcy Act of 1898, ch. 541, 30 Stat. 544 (1898) (repealed 1978). "The Bankruptcy Act of 1898 marked the beginning of the era of permanent federal bankruptcy legislation. The 1898 Act remained in effect for eighty years until being replaced by the Bankruptcy Reform Act of 1978." Charles J. Tabb, *The History of the Bankruptcy Law in the United States*, 3 Am. Bankr. Inst. L. Rev. 5, 23 (1995) (hereafter, "*History of Bankruptcy*").

[10] Charles J. Tabb, *The Historical Evolution of the Bankruptcy Discharge*, 65 Am. Bankr. L.J. 325, 364 (1991) (hereafter, "*Discharge*").

[11] "[The Statute of Anne] introduced the discharge of debts for the benefit of a debtor who cooperated in the bankruptcy

The 1898 Act altered the discharge process in two ways that pertain here. First, the 1898 Act removed the need for creditors' consent.[12] But more pertinent here, the 1898 Act sought to limit the need for judicial involvement in the granting of the discharge. Instead the Act provided for judicial intervention only to address a creditor's claim that the discharge was subject to some exception or denial.

> The United States Congress in 1898 did not just decline to give the bankruptcy court control over the discharge. At the same time, that control was taken away from creditors. The long-standing requirement of either creditor consent or a minimum dividend as a prerequisite to obtaining a discharge was eliminated. No check on discharges other than the statutory limitations remained. This innovation marked as much as anything else the arrival of the "modern" American pro-debtor discharge policy.

Tabb, *Discharge*, *supra*, at 364.

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proceeding. . . . At the same time, however, the Statute of Anne raised the stakes even higher for uncooperative debtors by providing for the death penalty for fraudulent bankrupts." Tabb, *History of Bankruptcy*, at 10.

[12] Under the third bankruptcy Act, enacted in 1867, discharge could be denied if the debtor had committed a number of dishonest or illegal acts, but importantly, "[t]he consent of a majority of the creditors was still required for discharge in most cases." *See* James J. White, *Bankruptcy and Creditors' Rights: Cases and Materials* 32 (1985).

The Congressional intent to limit the involvement of the court in granting the discharge, and to eliminate creditor control is pertinent here because the effect of the Ninth Circuit's decision is just the opposite. The decision interjects the court post-bankruptcy in determining the ultimate efficacy of the discharge by determining whether there is a good faith basis for a creditors' disregarding the discharge. It also reinstates a form of creditor "consent." Under the Ninth Circuit's decision, the effectiveness of the discharge rises and falls on a judicial determination of the subjective state of mind of the creditor, a determination often made years after the discharge is granted. Congress envisioned the opposite role for the courts.

Also pertinent in this case, the legislative history to the Act of 1898 reflects Congress's intent to create a meaningful "fresh start," intended to benefit both debtors and the larger economic community.[13] Thus, House Report of 1897, H.R. Rep. No. 65, 55th Cong., 2d Sess. 30-32 (1897), in addressing the question of "who is a debtor" noted the public benefit from the discharge:

> [T]his vast number [of debtors] constitutes an army of men crippled financially—most of them active, aggressive, honest men who have met with misfortune in the struggle

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[13] "The discharge was an integral part of the 1898 Bankruptcy Act, and both Congress and the judiciary have consistently read the Act as including the 'fresh start' as one of its primary goals." James J. White, *Bankruptcy and Creditors' Rights: Cases and Materials* 29 (1985) citing R. Lewis Townsend, *Fresh Cash-Another Element of Bankrupt's Fresh Start?* 31 U. Miami L. Rev. 275, 281 (1977).

> of life, and who if relieved from the burden of debt, would reenter the struggle with fresh hope and vigor and become active and useful members of society. . . .
>
> [T]he passage of a bankrupt law . . . will lift these terrible and hopeless burdens, and restore to the business and commercial circles of the country the active and aggressive elements that have met with misfortune and are now practically disabled for the battle of life. . . .
>
> When an honest man is hopelessly down financially, nothing is gained for the public by keeping him down, but, on the contrary, the public good will be promoted by having his assets distributed ratably as far as they will go among his creditors and letting him start anew.

In sum, the 1898 Act reflected Congress's view that the bankruptcy discharge is a foundational concept underlying bankruptcy law, and that it served the public interest as well as interests of the individual debtor. "[T]he 1898 law recognized formally for the first time the overriding *public* interest in granting a discharge to 'honest but unfortunate' debtors." Tabb, *Discharge, supra*, at 364 (emphasis in original). "The theory is that . . . the debtor then is able to resume his

or her place as a productive member of society." Tabb, *supra*, at 364-65.[14]

The 1898 Act's discharge provisions were before this Court at least three times between 1904 and 1934. During this period this Court endorsed the twin notions of a fresh start as being a benefit both to the debtor and the public, as well as the need for injunctive protection. *Wetmore v. Markoe*, 196 U.S. 68, 77 (1904);[15] *Williams v. U.S. Fid. & Guar. Co.*, 236 U.S. 549, 554-55 (1915).[16]

In 1934, this Court confirmed the ability of a bankruptcy court to enjoin creditor action in derogation of the discharge, thus presaging the enactment of § 524(a)(2). *Local Loan Co. v. Hunt*, 292 U.S. 234, 244 (1934). This injunctive power was tied directly to the notion of the fresh start and the public interest as well. *Id.* Indeed, the discharge was seen as a "fundamental private necessity." *Id.* at 245. But there was also a public benefit: "This purpose of the Act has been again and

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[14] Professor Tabb cites F. Noel: "The history of these laws is evidence of man's humanity to his fellow man." F. Noel, *A History of the Bankruptcy Law* 200 (1919).

[15] The Court held that the discharge did not apply, however, to a claim for alimony as it viewed such a claim as not being a "provable debt." This issue is obviously not before the Court.

[16] "It is the purpose of the bankrupt act to convert the assets of the bankrupt into cash for distribution among creditors, and then to relieve the honest debtor from the weight of oppressive indebtedness, and permit him to start afresh free from the obligations and responsibilities consequent upon business misfortunes."

again emphasized by the courts as being of public as well as private interest. . . ." *Id.* at 244.

### B. Congress amended the 1898 Act in 1970 to further strengthen the discharge protection by including an injunction against collection activities on discharged debts.

In 1970, Congress codified *Local Loan* by making the order of discharge an injunction, declaring that "an order of discharge shall enjoin all creditors whose debts are discharged from thereafter instituting or continuing any action . . . to collect such debts. . . ." Pub. L. No. 91-467, § 3, 84 Stat. 990, 991 (1970).

The 1970 amendments also rejected the notion that a discharge should merely be an affirmative defense by adding § 14f to the Bankruptcy Act, declaring that state court judgments are "null and void" to the extent they determined the personal liability attaching to a discharged debt. The rule until 1970 was that the bankrupt had the burden of pleading the certificate of discharge as an affirmative defense. Tabb, *supra*, at 360. If the debtor failed to plead the discharge, a final judgment could be entered despite the discharge, which would be given res judicata effect. Tabb, *id.* (citing Vern Countryman, *New Dischargeability Law*, 45 Am. Bankr. L.J., 1-2 (1971), in turn citing *Dimock v. Revere Cooper Co.*, 117 U.S. 559 (1886)).[17]

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[17] In *Local Loan* the Supreme Court held that a bankruptcy court had the jurisdiction to enjoin a creditor from suing a debtor

The legislative history made it clear that the purpose was to prevent creditors from suing debtors on discharged claims in the hope that they might not appear and thus could obtain a default judgment against the debtor.

> [T]he major purpose of the proposed legislation is to effectuate, more fully, the discharge in bankruptcy by rendering it less subject to abuse by harassing creditors. Under present law creditors are permitted to bring suit in State courts after a discharge in bankruptcy has been granted and many do so in the hope the debtor will not appear in that action, relying to his detriment on the discharge. . . . As a result, a default judgment is taken against him. All this results because the discharge is an affirmative defense which, if not pleaded, is waived.[18]

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on a discharged claim, but the injunction required action in the individual case. *See* 293 U.S. at 238.

[18] H.R. Rep. No. 91-1502 (1970), *as reprinted in* 1970 U.S.C.C.A.N. 4156. *See also* 116 Cong. Rec. 34,818 (Statement of Rep. Wiggins) (as quoted in *Lone Star Security Video, Inc. v. Gurrola* (*In re Gurrola*), 328 B.R. 158, 168 n.9 (B.A.P. 9th Cir. 2005), noting that by making the discharge an affirmative defense "the concept of a discharge in bankruptcy by which the Bankruptcy Act attempts to assure the honest but unfortunate person a fresh start is defeated."

### C. The 1978 Code added §§ 524(a)(1) and (a)(2) to prevent creditor conduct in derogation of the discharge; the Ninth Circuit's decision is contrary to the Congressional goals and purposes.

In the 1978 Code Congress enlarged the discharge injunction provision in new § 524(a)(2), as well as providing for other discharge protections. The Ninth Circuit's decision is contrary to the goals and purpose of §§ 524(a)(1) and (a)(2).

The Code contains a broad discharge provision,[19] and carries forward the same notion of the central importance of the discharge as found in the Act of 1898 and its amendments. The Code provides for the same three critical protections, each of which is pertinent here. It made the discharge non-discretionary and thus limited the role of the court in entering the discharge order; it provided for a stronger statutory injunction against suing on discharged claims; and it provided that acts taken in violation of the discharge are void. The goal was to protect against the very conduct that occurred in this case, namely, creditors suing debtors despite the discharge of the claim.

First, the 1978 Code continues to eliminate most judicial involvement in the decision on whether to enter an order of discharge. In the absence of a statutory exception to discharge (not relevant here) § 727 of the

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[19] The discharge is broad. It "discharges the debtor from all debts that arose before the date of the [bankruptcy petition]." 11 U.S.C. § 727(b) (2018).

Code provides that a bankruptcy court "shall grant the debtor a discharge." The Bankruptcy Rules provide that a discharge is to be entered as a matter of course after the time for filing objections has lapsed. *See* Fed. R. Bankr. P. 4004(c)(1).

This effort to remove the bankruptcy court from threshold determinations concerning the discharge is pertinent here, because the effect of the Ninth Circuit's decision is to involve the bankruptcy courts in determinations of a creditor's knowledge of the discharge; the Ninth Circuit has effectively interjected a new judicial role, despite Congress's long-standing efforts to do precisely the opposite.

Second, debtors are protected from creditor interference with their discharge by § 524(a)(2), which states that discharge "operates as an injunction against the commencement or continuation of an action . . . to collect, recover or offset any such debt as a personal liability of the debtor." Section 524(a) "retained and elaborated" on the provisions of § 14f of the Bankruptcy Act, and the legislative history made plain that Congress wanted precisely to preclude creditors suing debtors on discharged debts:

> Subsection (a) specifies that a discharge in a bankruptcy case voids any judgment to the extent that it is a determination of the personal liability of the debtor with respect to a prepetition debt. . . . *The injunction* is to give complete effect to the discharge and *to eliminate any doubt concerning the effect of the discharge as a total prohibition on debt*

> *collection efforts*. . . . [It] is intended to insure that once a debt is discharged, the debtor will not be pressured in any way to repay it.[20]

Finally, § 524(a)(1) sought to prohibit creditors from suing on discharged claims by providing that a judgment obtained on a discharged debt is "void." As noted above, Congress provided that the discharge is not merely an "affirmative defense" in a collection suit, but is an absolute, non-waivable defense, and that any judgment obtained in violation of the discharge is of no effect.[21] *See In re Gurrola*, 328 B.R. at 170.

Thus, "the enactment of § 524(a) and its predecessor reflect a clearly expressed and identified Congressional intent that a debtor be able to rely on the bankruptcy discharge without the burden of establishing her rights under the discharge against a meritless claim that is excepted from discharge and without being subjected to an adverse judgement by failure to defend." *In re Meadows*, 428 B.R. 894 (Bankr. N.D. Ga. 2010) (citing the legislative history of § 524, *supra*).

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[20] H.R. Rep. No. 95-595 at 365-66 (1977) *as reprinted in* 1978 U.S.C.C.A.N. 5963, 6321-22 (emphasis added). The Senate Report is the same. S. Rep. No. 95-989 at 80 (1978), *as reprinted in* 1978 U.S.C.C.A.N. 5787, 5866.

[21] *See In re Hamilton*, 540 F.3d 367, 372 (6th Cir. 2008). "This provision was designed 'to effectuate the discharge and make it unnecessary to assert it as an affirmative defense in a subsequent state court action.'" (citation omitted). *But cf.*, *Strata Res. v. State*, 264 S.W.3d 832, 843 (Tex. App. 2008).

### D. Congress did not intend for creditors to be able to disregard the discharge injunction based on a subjective standard of good faith or ignorance of the law.

There is nothing in the text or history of the Code to suggest that Congress intended to permit creditors to evade the discharge injunction by showing merely a subjective, good faith belief that they were in compliance. The standard is objective. And Congress certainly did not intend to permit a creditor to rely on the subjective "mistake of law" defense. The Ninth Circuit's decision moves in exactly the opposite direction by sanctioning a highly subjective declaration of good faith, even if unreasonable, as a defense.

This Court has held that a subjective good faith intent is not a defense to a violation of a civil injunction. Thus, in *McComb v. Jacksonville Paper Co.*, 336 U.S. 187, 191, 599 (1949) the Court stated as follows:

> The absence of willfulness does not relieve from civil contempt. Civil as distinguished from criminal contempt is a sanction to enforce compliance with an order of the court or to compensate for losses or damages sustained by reason of noncompliance. Since the purpose is remedial, it matters not with what intent the defendant did the prohibited act. The decree was not fashioned so as to grant or withhold its benefits dependent on the state of mind of respondents (citations omitted).

Likewise, the use of a subjective standard in the context of the bankruptcy injunction is even more inappropriate. Congress specifically intended for the discharge provisions *"to eliminate any doubt concerning the effect of the discharge as a total prohibition on debt collection efforts."*[22] Unlike civil injunctions, in which the court crafts a new injunction order from whole cloth, such is not the case in a bankruptcy matter. *See generally, In re Rose, supra*, at 183 n.12. It has been almost 50 years since Congress first introduced the injunction in § 14f of the prior Bankruptcy Act. Its essential mandate has not varied. The notion that a creditor cannot perceive the scope or application of the injunction is specious.

Even more so, the application of *Taggart* to institutional and corporate creditors is highly problematic, and one court has noted that none of the *Taggart* cases even address the issue of institutional creditors: "It is one thing for individuals to testify as to their subjective beliefs, but quite another for corporate representatives to testify as to the subjective belief of a corporation." *In re Rose*, 565 B.R. 178, 183 n.11 (Bankr. D. Nev. 2017).

This subjective standard will immerse the courts in precisely the fashion that both the Bankruptcy Act and the Code expressly sought to avoid. Bankruptcy courts will be forced to "engage in novel and unfettered inquiries into a 'creditor's state of mind.'" *Midland*,

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[22] H.R. Rep. No. 95-595 at 365-66 (1977), *supra* (emphasis added).

137 S.Ct. at 1419 n.5 (Sotomayor, J. dissenting). Similarly, in *In re Rose*, 565 B.R. 178, 183 n.11 (Bankr. D. Nev. 2017) the bankruptcy court expressed its concern that this highly subjective standard "opens the door to the assertion of too many 'Sargent Schultz' defenses ('I know nothing! Nothing!'), at the expense of the peace of mind that the discharge is supposed to provide to the individual debtors" (citation omitted).

A claim that one lacked an understanding of the law is also no defense to a violation of the discharge. This Court recently had occasion to consider whether a defense based on ignorance of the law, or mistake of law, should be permitted in somewhat similar circumstances. *Jerman v. Carlisle, McNellie, Rini, Kramer & Urlich, LPA*, 130 S.Ct. 1605 (2010). In *Jerman*, this Court held that in determining whether mistake of law is a defense the Court should look to the "statute's context and history." *Id.* at 1607.

*Jerman* concerned the Fair Debt Collection Practices Act. Section 813(c) of the Act, 15 U.S.C. § 1692k(c) provides that a debt collector is not liable in action brought under the Act if she can show "violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error." *Id.* at 1607. The question presented was "whether the bona fide error" defense in § 1692k(c) applies to a violation resulting from a debt collector's mistaken interpretation of the legal requirements of the FDCPA. *Id.* at 1607.

The Court held that ignorance of the law was not a defense. "We have long recognized the 'common maxim, familiar to all minds, that ignorance of the law will not excuse any person, either civilly or criminally.'" *Id.* at 1611, citing *Cheek v. United States*, 498 U.S. 192 (1992).

Further, the Court in *Jerman* held, "[o]ur law is therefore no stranger to the possibility that an act may be 'intentional' for purposes of civil liability, even if the actor lacked actual knowledge that her conduct violated the law" (citing *Kolstad v. American Dental Assn.*, 527 U.S. 526 (1999). *Id.* at 1612.

And, "[l]ikely for this reason, when Congress has intended to provide a mistake-of-law defense to civil liability, it has often done so more explicitly than here." *Id.* at 1612. Thus, this Court held that it was a "fair inference that Congress chose to permit injured consumers to recover actual damages . . . for 'intentional conduct,' including violations resulting from mistaken interpretation of the FDCPA. . . ." *Id.* at 1612.[23]

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[23] The bankruptcy court below referred to the test for contempt under § 105 as being a "willful" violation of the injunction. *In re Taggart*, 522 B.R. 627, 631 (Bankr. D. Or. 2014). But the same court stated that willful is defined in *Hardy* as meaning nothing more than an intent to do the acts which violate the injunction. *Id.* at 632. Your amici contend that the Code does not require a showing of "willfulness' nor is such to be implied. "It is sufficient that the creditor knows of the bankruptcy and engages in deliberate conduct that, it so happens, is a violation of the stay." In *IRS v. Murphy*, 892 F.3d 29, 37 (1st Cir. 2018) noting that the term "willfully" is a "chameleon." *Id.* at 35. The First Circuit further noted that in "common usage" the term "willful" was considered

The same rationale applies here. Indeed, this case is even stronger, as there is no statutory defense of "bona fide error." The context and history of the Code preclude any reliance on the notion that Congress intended for the creditor's unreasonable lack of knowledge that the discharge applied to its claim to undo its carefully crafted discharge provisions.

## II. The Ninth Circuit's use of a subjective defense of good will will permit creditors to easily disregard the discharge injunction.

The Ninth Circuit's decision that a good faith, subjective belief can excuse disregarding the bankruptcy injunction will encourage exactly the kind of abusive creditor conduct that Congress has sought to eliminate. If a debtor objects to the filing of a claim on a discharged debt, a creditor can readily plead lack of knowledge that the discharge applied to its claim. Thus, instead of merit-based resolutions, the system will allow under-represented and *pro se* debtors to be intimidated into surrendering their opportunity for a fresh start.

Numerous factors underlie the corrosive impact the Ninth Circuit's decision will have in making abusive conduct less risky. First, Congress intended to "make it unnecessary to assert [discharge] as an affirmative defense in a subsequent state court action." *See In re Hamilton*, 540 F.3d 367, 372 (6th Cir. 2008). "The

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synonymous with such words as "voluntary," "deliberate" and "intentional." *Id.*

purpose of the provision [§ 524] is to make it absolutely unnecessary for the debtor to do anything at all in the collection action." *Id.* at 373. Despite this mandate some state statutory enactments still identify discharge as an affirmative defense and some courts seem to make statements that vary from the federal law. *See, e.g., Strata Res. v. State*, 264 S.W.3d 832, 843 (Tex. App. 2008); *see also* Tex. R. Civ. P. 94 ("In a pleading to a proceeding a party shall set forth affirmatively . . . discharge in bankruptcy. . . .").[24]

Congress recognized that individual debtors are unlikely to appear and defend against collection suits, regardless of a valid defense. Consumer debtors often permit the entry of default judgments, regardless of the merits of a claim; institutional debt collectors take advantage of this. "[C]onsumers do fail to defend themselves in court—in fact, according to the FTC, over 90% fail to appear at all. . . . The result is that debt buyers have won 'billions of dollars in default judgment' by simply filing suit and betting that consumers will lack the resources to respond." *Midland Funding, LLC v.*

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[24] Some state procedural rules may have followed Fed. R. Civ. P. 8, which until 2010, provided that the bankruptcy discharge was an affirmative defense. However, the Committee Note to the 2010 amendments now clarifies this: "Subdivision (c)(1). 'Discharge in bankruptcy' is deleted from the list of affirmative defenses. Under 11 U.S.C. § 524(a)(1) and (2) a discharge voids a judgment to the extent that it determines a personal liability of the debtor with respect to a discharged debt. The discharge also operates as an injunction against commencement or continuation of an action to collect, recover, or offset a discharged debt. For these reasons, it is confusing to describe the discharge as an affirmative defense."

*Johnson*, 137 S.Ct. 1407, 1417 (Sotomayor, J., dissenting).[25]

Moreover, the burden of proof is a substantial barrier for debtors who seek to enforce the discharge injunction in bankruptcy court. The Ninth Circuit held that "the moving party [the debtor] has the burden of showing by clear and convincing evidence that the contemnors violated a specific and definite order of the court." *In re Taggart*, 888 F.3d at 443. *See also In re Dyer*, 322 F.3d 1178, 1190 (9th Cir. 2003). Further elaborating, the court stated that "to justify sanctions the movant [the debtor] must prove that the creditor (1) *knew the discharge injunction was applicable* and (2) intended the actions which violated the injunction." *Id.* (emphases added).

Thus, the debtor's burden includes specific showings of "knowledge" of the injunction's applicability, a highly subjective state of mind that must be shown by clear and convincing evidence. Under the clear and convincing standard, the debtor must "place in the ultimate fact finder an abiding conviction that the truth of its factual contentions are 'highly probable.' Factual contentions are highly probable if the evidence offered in support of them 'instantly tilt[s] the evidentiary scales in the affirmative when weighed against the

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[25] This observation is supported by the empirical literature. *See generally* Peter A. Holland, *Junk Justice: A Statistical Analysis of 4,400 Lawsuits Filed by Debt Buyers*, 26 Loy. Consumer L.Rev. 179 (2014).

"evidence [the non-moving party] offered in opposition.'" *Emmert v. Taggart* (*In re Taggart*), 548 B.R. 275, 288 n.11 (B.A.P. 9th Cir. 2016) (citation omitted).

Assuming the debtor somehow shows the requisite intent and knowledge, the burden then shifts to the creditor, who can prevail merely by showing "good faith."[26] One may fairly question how the typical individual debtor can realistically rebut an institutional creditor's subjective claim of good faith. Bad faith cannot be inferred from knowledge of the bankruptcy alone. *In re Taggart*, 888 F.3d at 443. An unreasonable belief that a creditor was not barred from suing on a discharged claim will often be easily created, and it is difficult to imagine how a debtor could satisfy its burden in refuting good faith, absent an unlikely "confession" by the creditor.

Finally, burden aside, the cost and time to litigate the creditor's state of mind will often be beyond what an individual debtor can sustain. The subjective standard of "good faith" would require the debtor to engage in costly discovery, some of which is likely to be resisted. Individual debtors frequently lack the resources to pay legal counsel to defend against discharge litigation, as Congress has recognized. Prior to enactment of the 1978 Code, the House Judiciary

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[26] This is precisely what occurred below. The bankruptcy court concluded that the respondents "knowingly violated the discharge injunction." *In re Taggart*, 888 F.3d at 444. The bankruptcy court found that a good faith belief that the discharge was inapplicable was irrelevant. *Id.* The BAP, however, held that a good faith belief was determinative. 548 B.R. at 290.

Committee noted that "[t]he threat of litigation over this [discharge] exception and its attendant costs are often enough to induce the debtor to settle for a reduced sum, in order to avoid the costs of litigation" even with respect to "marginal cases." H.R. Rep. No. 95-595 (1977).[27] *See also* Andrew F. Emerson, *So You Want to Buy a Discharge? Revisiting the Sticky Wicket of Settling Denial of Discharge Proceedings in the Chapter 7 Bankruptcy*, 92 Am. Bank. L.J. 111, 118-23 (2018).

Debtors are unlikely to be able to rely on their Chapter 7 counsel to represent them in discharge litigation. Lawyers have no duty to do so. Legal counsel for Chapter 7 debtors frequently "unbundle" their legal services and decline to undertake representation of the debtor in an adversary proceeding challenging the discharge.[28] "Unbundling" allows an attorney to limit the scope of his or her representation by excluding expensive tasks like adversary proceedings from their general services. Chapter 7 debtor counsel have no obligation to represent the debtor post-discharge if a civil suit is filed in state court to collect on a discharged

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[27] *See also* William F. Stone, Jr. & Bryan A. Stark, *The Treatment of Attorneys' Fee Retainers in Chapter 7 Bankruptcy and the Problem of Denying Compensation to Debtors' Attorneys for Post-Petition Legal Services They Are Obligated to Render*, 82 Am. Bankr. L.J. 551, 555 n.25 (2008).

[28] For example, Local Rule 2090-5(B) of the Bankruptcy Court for the Northern District of Illinois expressly excludes representation in adversary proceedings from the duties of an attorney arising from an appearance on behalf of a debtor.

claim and debtors who appear *pro se* have less favorable outcomes in judicial proceedings.[29]

Conversely, intuitional creditors are typically well-represented by counsel. The plaintiff in such suits is frequently not the original creditor, but one of the "bottom fishers" who buy consumer debt for pennies on the dollar, and often file suits despite facial defects.[30] These institutional creditors are well-funded, and their costs are diminished by the likelihood that consumers will lack the resources to defend the discharge. *See id.* ("The clearest trend, repeatedly highlighted in the literature, is that defendants often do not respond to collection suits.") Holland, *Junk Justice*, *supra*, at 227.

These concerns over creditor disregard of the injunction are not hypothetical. In the relatively short time since *Taggart* was decided there have been numerous decisions which illustrate the ease by which the injunction is ignored. Some of these cases are discussed in the amicus brief of the National Consumer Bankruptcy Rights Center filed in these proceedings (NACBA Br. p. 7 *et seq.*) "In each of the cases cited

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[29] *See, e.g.*, Rafael I. Pardo, *An Empirical Examination of Access to Chapter 7 Relief by Pro Se Debtors*, 26 Emory Bankr. Dev. J. 5 (2009); Angela Littwin, *The Affordability Paradox: How Consumer Bankruptcy's Greatest Weakness May Account for Its Surprising Success*, 52 Wm. & Mary L. Rev. 1933, 1957 (2011) ("The percentage of pro se cases rose statistically significantly, especially among lower-income debtors, while the percentage of these cases ending with a discharge of debt declined.").

[30] *See generally* Holland, *Junk Justice, supra; Midland Funding*, 137 S.Ct. 1407 (2017).

above, including *Taggart*, the debtor proved that the debtor filed bankruptcy, the creditor's debt was listed, the creditor received notice of the discharge, the creditor did not object to the discharge, and that the creditor continued to personally collect against the debtor or debtor's property on a debt it knew was discharged.[31] In each of the cases the debtor's counsel informed the creditor or its counsel that the creditor's actions were violating the discharge injunction. In each case, the creditor continued its collection action." *Id.* at 14. Indeed, what these four cases demonstrate is that even a debtor's notification to the creditor in writing explaining that the debt is discharged is insufficient to show the requisite subjective intent. *Id.* at 14.

## III. Empirical studies and academic scholarship demonstrate that the bankruptcy discharge has been effective in achieving the Congressional goals and policies that underlie the discharge provisions.

A substantial body of scholarship and empirical evidence demonstrates that the Congressional goals inherent in the discharge provisions have been effective. The discharge has proven to be of vital importance to both the individual debtor and to the larger

[31] *Parker v. Nelson* (*In re Nelson*), No. 15-1416, 2016 WL 7321196 (B.A.P. 9th Cir. Dec. 15, 2016); *Rogerson v. Shaw* (*In re Shaw*), No. 15-1406, 2017 WL 2791663 (B.A.P. 9th Cir. June 27, 2017); *Morning Star Company v. Benech* (*In re Benech*), 17-CV-05100-LHK (N.D. Cal. July 25, 2018) (NACBA App. 1a); *Bruce v. Fazilat* (*In re Bruce*), Adv. No. 8-15 ap-01028, 2018 WL 3424581 (Bankr. C.D. Cal. July 12, 2018).

economy.[32] The effect of the Ninth Circuit's decision, however, would greatly diminish the effectiveness of the Congressional discharge scheme.

The discharge provisions are properly targeted towards those who need the protection. Empirical analysis has demonstrated those who file for bankruptcy relief and seek the discharge are in desperate need of relief, not "can pay" debtors and typically endure serious stigma from the filing. The typical individual debtor turns to bankruptcy due to a serious economic plight, rather than because of over-spending, or other non-productive economic behavior. "[W]hen bankrupt debtors as a group are compared to the general population, their situations are grim." Teresa A. Sullivan, et al., *As We Forgive Our Debtors: Bankruptcy and Consumer Credit in America* 77 (1999). The authors found that debtors have "staggering debts in relation to their income" and are a "segment of America in financial collapse." *Id.*[33]

Second, the decision to file for bankruptcy is usually the result of oppressive debt obligations, including

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[32] While some of the articles are twenty years old, their influence continues to the present day, and their underlying insights remain valid. *See generally* Michael D. Sousa, *The Persistence of Bankruptcy Stigma*, 26 Am. Bankr. Inst. L. Rev. 217 (2018) (hereafter "Sousa") (collecting prominent research articles and substantial databases on discharge issues).

[33] "The economic profile of debtors [in their study] demonstrated that the latter group was in far worse financial trouble than their earlier counterparts as measured by, among other variables, debt-to-income ratios and the amount of average unsecured debt." Sousa, *supra* at 228.

catastrophic medical problems such as cancer, automobile and industrial accidents, and age-related issues.[34] When asked why they filed for bankruptcy, 67.5 percent of debtors reported job loss, 19.3 percent cited a medical event, and 22.1 percent listed family concerns (i.e., divorce for example) as contributing factors. Teresa A. Sullivan, et al., *The Fragile Middle Class: Americans in Debt*, 16 fig. 1.2 (2000). These Americans file for bankruptcy not because it is "an easy way out," but because they have exhausted their other options. Teresa A. Sullivan, et al., *Limiting Access to Bankruptcy Discharge: An Analysis of the Creditors' Data*, 1983 Wis. L. Rev. 1091, 1138 (1983). In other words, "[f]ew people file bankruptcy without crushing debts." Sousa, *supra*, at 226.

The filing for bankruptcy is traumatic and causes feelings of stigma and shame.[35] According to empirical data collected by Professor Michael D. Sousa, most of the debtors he interviewed "experienced deep feelings of shame, embarrassment and instances of stigmatization." Sousa, *supra*, at 230. Indeed, "bankruptcy stigma appears to have increased over the past four

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[34] Maurie Backman, *This Is the No. 1 Reason Americans File for Bankruptcy*, The Motley Fool (May 1, 2017) https://www.fool.com/retirement/2017/05/01/this-is-the-no-1-reason-americans-file-for-bankrup.aspx.

[35] "There is robust literature in the social sciences regarding the association between socioeconomic disadvantage and mental health, including suicide. . . . [T]he more debt an individual possessed the more likely that he or she suffered from mental disorder, neurosis, psychosis, alcohol dependency or drug dependency." Sousa, *supra* at 232 (citations omitted).

decades. . . ." *Id.* at 235. "[S]tigma has increased and the rising numbers of filings are actually the net result of two opposing trends—economic forces may have pushed more families to the brink of bankruptcy, while increasing stigma may have prevented even more distressed families from filing." *Id.* at 239 (citing Teresa L. Sullivan, et al., *Less Stigma or More Financial Distress: An Empirical Analysis of the Extraordinary Increase in Bankruptcy Filings*, 59 Stan. L. Rev. 213, 228-33 (2006)).

Discharge is vital in a third respect: it has shown a demonstrable effect in restoring debtors to a productive role in the larger economy. Indeed, "the average person who files for bankruptcy to relieve financial stress catches up with their peers." Jay L. Zagorski & Lois R. Lupica, *A Study of Consumers' Post-Discharge Finances: Struggle, Stasis, or Fresh-Start?* 16 Am. Bankr. Inst. L. Rev. 283, 289 (2008).[36] "None of the data indicate that over time the size of the financial gap between bankruptcy filers and non-filers either gets wider or stays the same; for the most part, the size of the financial gap between these two groups narrows over time." *Id.* at 307.

Fourth, without bankruptcy discharge, only a small fraction of debtors have any hope of repaying their debt outside of bankruptcy. Even those debtors who voluntarily attempted repayment in Chapter 13

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[36] *See also* Katherine Porter & Deborah Thorne, *The Failure of Bankruptcy's Fresh Start*, 92 Cornell L. Rev. 67, 87 (2006) ("The majority, 65% of families, reported that their financial situations had improved since they filed bankruptcy.").

often failed: at most, only about a third were able to complete their repayment plans, and a significant portion of those debtors were making only minimal repayments. *See* Teresa A. Sullivan, et al., *Consumer Debtors Ten Years Later: A Financial Comparison of Consumer Bankrupts 1981–1991*, 68 Am. Bankr. L.J. 121, 123 (1994).

Discharge benefits both debtors and the larger macro economy. "The theory is that society as a whole benefits when an overburdened debtor is freed from the oppressive weight of accumulated debt. The debtor then is able to resume his or her place as a productive member of society." Charles J. Tabb, *The Historical Evolution of the Bankruptcy Discharge*, 65 Am. Bankr. L.J. 325, 364-65 (1991). "Bankruptcy law . . . serves significant macroeconomic goals[;] . . . the Chapter 7 debt discharge prevents the development of an insolvent underclass. . . ." Amber J. Moren, Note, *Debtor's Dilemma: The Economic Case for Ride-Through in the Bankruptcy Code*, 122 Yale L.J. 1594, 1618 (2013).

Ultimately, empirical data show that "bankruptcy laws are generally serving the people they were designed to serve: people in serious, even hopeless financial trouble, who need either a fresh-start discharge from their debts or at least some [breathing spell]." Sullivan, *As We Forgive Our Debtors*, *supra*, at 77. This Court has consistently emphasized that the bankruptcy discharge is of profound public and private importance. In 1915 this Court correctly perceived the need to have a legal system that restores debtors to

productive participation in the economy. *See Williams v. United States*, 236 U.S. 549, 554-55. In 1918, this Court emphasized the "great public interest" in protecting the discharge. *Stellwagen v. Clum*, 245 U.S. 605, 617 (1918).

The Ninth Circuit's decision plainly would impair the financial and social benefits that Congress intended for the discharge to achieve.

## CONCLUSION

For the foregoing reasons, we respectfully request that this Court reverse the decision of the Ninth Circuit.

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Respectfully submitted,

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